Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court Of The United States

KENT SOMMER and ANDREA SOMMER,

Petitioners,

v.

G. WILLIAM DAVIS and CHARLES G. NORTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether Tennessee law applies, as opposed to the Federal Rules of Evidence, concerning the qualifications of expert witnesses and, assuming that Tennessee law applies, whether the Trial Court erred in misapplying Tennessee law to Plaintiffs' expert witnesses? And whether the Tennessee statute in imposing a geographical requirement upon expert witnesses in malpractice cases is constitutional?

PARTIES OF THE CASE

Petitioners - Kent A. Sommer and Andrea Sommer

Respondents - G. William Davis and Charles G. Norton

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per J., William J. Haynes, Jr., J.) granted respondent's motion for summary judgment (Appendix (A1)). The court of appeals' opinion (per Gilman, C.J.) affirming (Appendix (A12)) is published at 317 F.3d 686.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on January 30, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

F.R.E. 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

T.C.A. 29-26-115

(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice

in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection when it determines that the appropriate witnesses otherwise would not be available.

(c) In a malpractice action as described in subsection (a), there shall be no presumption of negligence on the part of the defendant; provided, there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that

the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence. (d) In a malpractice action as described in subsection (a), the jury shall be instructed that the claimant has the burden of proving, by a preponderance of the evidence, the negligence of the defendant. The jury shall be further instructed that injury alone does not raise a presumption of the defendant's negligence.

STATEMENT OF THE CASE

This is a medical malpractice case based upon diversity of citizenship. The Plaintiffs, Kent and Andrea Sommer, allege that Dr. Davis negligently performed surgery on Kent's lower back by instrumenting across an unfused joint in the lumbar spine. Kent further claims that Dr. Norton, who is employed by Dr. Davis, was negligent in not inspecting the back at a time when Dr. Davis removed the cages; that is, the instruments that Dr. Davis had used initially in trying to fuse the disks in Kent Sommer's lumbar area.

The Trial Court granted summary judgement in favor of Dr. Norton and against the Plaintiffs, and then dismissed the Plaintiffs' cause of action against Dr. Davis with prejudice. Both rulings were based on decisions by the Trial Court concerning the admissibility of testimony by expert witnesses. The Trial Court ruled that Tennessee law controlled, not the Federal Rules of Evidence, concerning the admissibility of opinion testimony by expert witnesses.

On the 15th day of July, 1997, Dr. G. William Davis performed back surgery on the lumbar area of Kent Sommer. In performing this procedure he utilized two different types of instruments, the BAK cage as well as the VeriGrip. During that procedure Dr. Davis immobilized an unfused joint. Sommer had problems with his back, was eventually seen by Dr. Norton, an employee of Dr. Davis, who removed the instruments which had been placed there by Dr. Davis. Dr. Norton, then, was added as a Defendant because Dr. Gornet believed that Dr. Norton did not use proper procedures in examining the area where the instruments were placed.

Dr. Gornet first saw Kent Sommer in September of 1998 and at that point determined that Dr. Davis had violated the appropriate standard of care when he immobilized across an unfused joint. Dr. Gornet performed such good surgeries on Kent Sommer to decrease the amount of pain he was experiencing. Kent Sommer did improve, but not to the point where he could return to work.

Plaintiffs filed suit against Dr. Davis, and, as indicated, added Dr. Norton as a Defendant. Prior to trial in the case concerning Dr. Davis, the Defendant Davis filed a Motion in Limine again seeking to prohibit an expert witness from being allowed to testify and moved to bar Dr. Gornet's testimony, claiming that Dr. Gornet was not qualified. The Trial Court conducted a hearing on that matter and in spite of overwhelming evidence to the contrary, found, applying incorrectly, Tennessee

law, that Dr. Gornet was not qualified to testify as an expert witness. Plaintiffs' cause of action was dismissed. Plaintiffs appealed and the United States Court of Appeals, Sixth Circuit affirmed.

REASONS WHY WRIT SHOULD BE GRANTED

This Court should grant Petitioners' Writ of Certiorari because this case presents an important question of federal law which the Court has not addressed. In a diversity action, Federal Rule of Evidence 702 controls the admissibility of expert testimony. That rule, which is a codification of Daubert, establishes standards throughout the United States and requires that these standards be maintained by federal district judges in their capacity as "gate keepers".

Tennessee has an unconstitutional statute that attempts to prohibit experts from testifying against doctors in medical malpractice cases unless those experts reside in or in a state adjacent to Tennessee. There is no rational relationship between that geographical requirement, and the state's desire to make certain that proper testimony is provided against medical doctors concerning the appropriate standard of care in medical malpractice cases.

Tennessee substantive law does control concerning the locality rule. There is nothing unconstitutional or illegal about a locality rule. However, it is a violation of Federal Rules of Evidence for a state to attempt to impose unreasonable qualifications on an expert who might testify about that local

standard. Here, the clear unequivocal evidence is that Dr. Gornet was qualified, was aware of the local standard of care, and should have been allowed to testify. They met the Tennessee locality rule requirements and the Federal Rule of Evidence requirements concerning experts. The Trial Court erred in prohibiting the Plaintiffs from using experts of the Plaintiffs' choice and by usurping the role of the jury in weighing the testimony concerning the standard of care.

1. The Trial Court erred in applying Tennessee, as opposed to federal law, concerning the qualifications of a witness.

It is undisputed that federal law controls concerning evidence. This principle was first established in Erie R. Co. v. Tompkins, 304 U.S. 67 (1938) and was clarified by Byrd v. Blueridge Rural Electric Co-op, Inc. 356 U.S. 525 (1958) and by Hanna v. Plumer 380 U.S. 460 (1965). In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) it was clearly held that in diversity cases the federal rules of evidence applied. Daubert has been codified by Federal Rule of Evidence 702, which was in effect at the time the trial court improperly ruled in this case. There really is no dispute as to this principal of law. See also Sibbach v. Wilson & Co., Inc., 312 U.S. 655 (1941), Scott v. Sears, Roebuch & Co., 789 F.2d 1052 (1986), Stutzman v. CRST, Inc, 997 F.2d 291 (1993).

Plaintiffs' position is this – Tennessee law does in fact control the substantive issue of the requirements of proof placed

upon malpractice litigants by T.C.A. §29-26-115(a). However, the Federal Courts are not bound to follow the procedural requirements imposed upon malpractice litigants by T.C.A. §29-26-115 (b), and must instead follow the standards for qualification of expert witnesses set forth in Federal Rule of Evidence 702. Federal Rule of Evidence 702 states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A review of the discovery deposition of Dr. Gornet in this case would indicate that, first, he is eminently well qualified as a board certified orthopedic surgeon. He has published, taught and practiced concerning the area of medicine in question. Dr. Gornet's testimony as a treating doctor and as an expert would certainly have assisted the trier of fact in understanding the evidence in determining facts in issue. He was qualified by knowledge, skill, experience, training and

education and should have been allowed to testify.

The Defendant claimed that Dr. Gornet could not testify because he was not familiar with the standard of care. That objection goes to the weight, not the admissibility of the testimony. Dr. Gornet was qualified to testify in this case both as a treating physician and as an opinion witness and to offer expert testimony under Federal Rule 702 or Daubert and its progeny.

Dr. Gornet was qualified to testify in this case as both a treating physician and as a Rule 702 expert. The trial court erred in prohibiting him from testifying.

II. Assuming that Tennessee law applied concerning the qualifications of expert witnesses, the Trial Court erred in holding that Dr. Gornet was not qualified to testify.

The applicable statutory law in Tennessee provides as follows:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
>
> (2) That the defendant acted with less than or

failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection when it determines that the appropriate witnesses otherwise would not be available.

(c) In a malpractice action as described in subsection (a), there shall be no presumption of negligence on the part of the defendant; provided, there shall be a rebuttable presumption

> that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence.
>
> (d) In a malpractice action as described in subsection (a), the jury shall be instructed that the claimant has the burden of proving, by a preponderance of the evidence, the negligence of the defendant. The jury shall be further instructed that injury alone does not raise a presumption of the defendant's negligence.

Dr. Gornet meets all the qualifications of the statute. He does reside in Missouri which abuts Tennessee. He is clearly familiar with the appropriate standard in Nashville and in a similar community. Concerning Nashville, Dr. Gornet testified that he has in fact been there; that he is familiar with that medical community; that he is particularly familiar with Dr. McNamara, a disclosed defense expert, and that he was aware of the disclosed opinions of the other defense experts. None of them testified that they were aware of any one, other than Dr. Davis, using a BAK cage and a VeriGrip to instrument across an unfused joint. Moreover, Dr. Gornet had reviewed medical records from the Nashville community and had the opportunity to treat numerous patients who had been treated previously by

Dr. Davis. Dr. Gornet has had the opportunity and did review the depositions for all of the other doctors who had testified. Based on all of this he clearly was aware of the standard of care and the practice of orthopedic surgery as it pertained to the placement of BAK Cages as of July, 1997, the time period relevant in this case, in Nashville or a similar communities, like St. Louis. Dr. Gornet stated that Nashville, like St. Louis, is dominated by a renowned medical school. In Nashville it is Vanderbilt. In St. Louis, it is Washington University. He indicated that St. Louis, like Nashville, had numerous specialities and that the standard for the performance of lumbar fusion surgery was the same in St. Louis as it was in Nashville in 1997. In the area concerning lumbar fusion surgery, the standard in both communities were indeed similar if not exactly the same.

However what the Trial Court apparently failed to perceive is that Dr. Gornet's opinion was that the national standard was also the standard in Nashville. There is absolutely nothing in the record that indicates that what Dr. Gornet said was not the standard. The fact that the standard is the same in Nashville and St. Louis and nationally does not mean that Dr. Gornet does not know what that standard is. In applying any relevant Tennessee case to the facts of this case, one would have to conclude that Dr. Gornet's testimony was improperly barred.

A couple of Tennessee cases on point illustrate Plaintiffs' position. The locality rule is designed to protect doctors in rural

areas from being forced to meet the requirements of specialists in metropolitan areas. For example, in Ledford v. Moskowitz, 742 S.W.2d 645 (Tenn.Ct.App. 1987) the court allowed a neurologist to testify about the care provided by a psychiatrist based on the fact that the neurologist was familiar with the applicable literature with, the medication that was being used, and with the applicable standard of care. Applying Ledford to the case before this Court, it is unquestioned that Dr. Gornet would qualify.

The defense argued that Dr. Gornet should not be allowed to change the testimony he had previously given in a different case. The fact that one testifies differently at some prior time under oath certainly is admissible as far as impeachment is concerned. However, impeachment is not evidence. Impeachment goes to the credibility and to the weight of the testimony. Dr. Gornet's discovery deposition was taken. In that deposition he in fact did inform the Defendants, far in advance of trial, as to what his opinions were and the basis for those opinion.

In Wilson v. Patterson, 2001 WL 912807 (Tenn.Ct.App. Aug. 10, 2001), the Court was called upon to examine an expert's testimony regarding the applicable standard of care to determine if there was sufficient proof that Lexington, Kentucky, where the expert practiced, was similar to the locality of defendant's practice, Memphis, Tennessee. In that case, the expert first testified that a national standard was applicable, and

later submitted affidavits that clarified that the standard in Lexington, Kentucky, and Memphis, Tennessee, were the same as the national standard. Further, he was familiar with the standard in Memphis because, like Lexington, it was a regional medical center, had a medical school and he had testified in trials there, which involved reading medical records and depositions of other doctors in the area. The Court in Wilson found that while the expert's testimony on the similarities between the medical communities of Lexington and Memphis was "somewhat meager," it was determined to be enough to survive dismissal on summary judgment. Wilson describes the applicable standard under T.C.A. §26-29-115 as follows:

> We do not conclude that a physician's reference to a national standard automatically excludes that doctor's testimony on the basis of the locality rule . . . The question is whether the expert possesses knowledge of the standard in the relevant community. The expert must have 'some knowledge' as a basis for his or her opinion on the applicable standard. The purpose of the locality rule is to insure that 'doctors charged with negligence in this state receive a fair assessment of their conduct in relation to community standards similar to the one in which they practice.' Whether the proposed expert can provide the basis for such a 'fair assessment' is

> the fundamental issue to be determined by the court in ruling on the admissibility of the expert's testimony. (emphasis added).

Dr. Gornet was abundantly qualified to render a "fair assessment" of Dr. Davis conduct in this case. Acceptance of the Court's ruling in this case is acknowledgment that the standard of care is so dramatically different in St. Louis than it is in Nashville that a St. Louis doctor cannot (as a matter of law) render such a "fair assessment" of the standard of care in Nashville. Merely putting that conclusion on the written page illustrates its absurdity.

Plaintiffs acknowledge that the Wilson court concluded that based upon the facts in that case, the expert's testimony was properly excluded under the locality rule. Of course, in that case, the expert testified that he would expect the standard of care in Nashville to be the same as the national standard, and the Court found that no other basis for that expert's knowledge of the Nashville medical community's standard of care existed other than the expert's knowledge of the national standard, and his opinion that the national standard should apply to Nashville. That facts of Wilson are clearly distinguishable from the facts of the case at bar, where Dr. Gornet testified regarding his knowledge of the Nashville medical community as well has his knowledge of a similar community, i.e., St. Louis.

III. The statute requiring an expert to be licensed and to practice within Tennessee or an adjacent state during the year prior to the time the alleged malpractice occurred is unconstitutional.

Plaintiffs are aware of the Sutphin v. Platt, 720 S.W.2d 455 (Tenn. 1986) which held that the statute cited herein requiring an expert witness to practice in and to be licenced in an adjacent state or in Tennessee the year prior to the alleged malpractice, was constitutional. In reaching that decision the Tennessee court, in effect, admitted that the statute was without logic. However, the court found, erroneously, that under the "rational basis" test a rational basis for the legislation did exist.

That decision was wrong. The court did not properly analyze the question. It found that there was a legitimate state interest in assuring that doctors charged with negligence received a fair assessment of their conduct in relation to community standards similar to the ones in which they practiced. However, there is absolutely no rational basis between that valid state interest and geography. There is no rational basis for finding that an expert would not be competent to testify if that expert did not live and practice in Tennessee or a contiguous state one year prior to the alleged commission of malpractice. The territorial requirement has absolutely no connection to logic. The issue is whether the expert has knowledge about the applicable standard of care. The standard of care could be the same in Osh-Kosh, Wisconsin as it is in Nashville and if the

doctor from Wisconsin is aware of the standard he should be allowed to offer testimony. The Sutphin court went too far and with no basis. In City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) the Supreme Court reversed a city's denial of a special use permit for mentally retarded persons based on an unsubstantiated fear or negative attitude about such persons. The court found that there was no rational basis for the actions by the city in that case. In Cleburne there was no rational basis for the classification that was made. In the case before this court, the same conclusion must be reached. There is absolutely no rational basis for believing that where one lives has anything to do with whether one is qualified to offer opinion testimony. The only issue is whether a witness is qualified to testify and a proper foundation can be laid that the witness has knowledge about the standard of care and thus its breach. That is the type of decisions that courts make on a regular basis. This law discriminates against out of state plaintiffs and there is no rational basis for that discrimination. Such a law could be used to discriminate against certain groups or used to protect certain groups. Either such result could be unconstitutional. The statute is unconstitutional and this court should so rule. No rational basis exists between the state's legitimate interest in assuring Tennessee doctors with a fair assessment of their conduct in relation to community standards similar to the ones in the community in which they practice AND the requirements of §29-26-115(b). After all, the medical community at issue

herein is not in rural eastern Tennessee, rather the medical community at issue is home to a prestigious medical school, and is in fact a regional medical center, not only for Tennessee, but also for patients from many other states – including the Plaintiffs.

Another way in which the Tennessee statute bears no rational relationship to the stated state interest it relates to is the "contiguous state" requirement. The states which are contiguous to Tennessee are Alabama, Arkansas, Georgia, Kentucky, Mississippi, Missouri, North Carolina, and Virginia. Is it logical to believe that a physician from Kansas City, Missouri (555 miles) or Gulf Shores, Alabama (467 miles), is more qualified to render an opinion on the appropriate standard of care in Nashville, Tennessee, than a doctor in Carbondale, Illinois (205 miles) or Evansville, Indiana (150 miles)? The contiguous state requirement bears no rational relationship to the interest of the state in assuring fair trials.

The Tennessee statute bears no rational relationship to its stated purpose. It should be declared unconstitutional. At the very least, it should not be used as a shield in Federal court behind which negligent doctors may hide.

CONCLUSION

Wherefore the Petitioners request that this Court grant their Petition for Writ of Certiorari and hear this case due to the compelling issues presented which this Court has not ruled upon.

Respectfully Submitted,

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APPENDIX

A 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

KENT A. SOMMER, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. 3:98-1115
	)	
G. WILLIAM DAVIS, ET AL.,	)	JUDGE HAYNES
	)	
Defendants.	)	

ORDER

For the reasons stated in open Court and in accordance with the accompanying Memorandum, the Defendants' motion for a Rule 104 hearing to exclude the expert opinion testimony of Dr. Matthew Gornet (Docket Entry No. 82) is **GRANTED** and Dr. Gornet expert testimony is **EXCLUDED** as inadmissible under Tennessee law. Accordingly, this action is DISMISSED with prejudice for Plaintiffs' failure to introduce expert testimony on the cause of Plaintiff Kent Sommer's alleged injuries. The Plaintiffs' motion to reconsider the award

of summary judgment to the Defendant Charles G. Norton is **DENIED**.

This Order shall constitute the Final Judgment in this action.

It is so **ORDERED**.

ENTERED this the 23rd day of May, 2001.

s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

A 3

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

KENT A. SOMMER, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. 3:98-1115
	)	JUDGE HAYNES
G. WILLIAM DAVIS, ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM[1]

Before the Court is the defendant Davis' motion for Rule 104 on the admissibility of the proposed expert opinion testimony of Dr. Matthew Gornet. (Docket Entry No. 82). In earlier proceedings, Plaintiffs' counsel represented that Dr. Gornet would give testimony as a treating physician and fact witness, not as an expert witness. See Docket Entry No. 87 at p. 6. In any event, Plaintiffs' counsel served a Rule 26 expert

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1 This Memorandum is a revised version of the Court's ruling at the conclusion of the Rule 104 hearing.

report of Dr. Gornet's expert testimony in July 2000. As discussed below, based on hi testimony at the Rule 104 hearing, Dr. Gornet's prior report does not comply with Fed.R.Civ.P. 26(a)(2) because the report does not provide all the bases upon which he now bases his expert opinion in this action and Dr. Gornet did not disclose these facts in his earlier deposition testimony. These late disclosures of critical factual information circumvents the purpose of Rule 26(a)(2) that is to allow effective cross-examination based upon full disclosure of the bases of expert's opinions. See Advisory Committee Notes to the 1970 Amendment to Rule 26, 48 F.R.D. 487, 503 (1970).

In any event, the parties do not dispute that Dr. Gornet has a requisite experience and education to be qualified as a medical expert on back surgeries. The focus of the dispute is upon whether Dr. Gornet has provided sufficient facts to meet the requirements of the Tennessee law for expert proof that the

defendant Davis did not conform his conduct to the standard of care in the community or a similar community.

In his earlier testimony and at the Rule 104 hearing, Dr. Gornet conceded that he never treated patients in Tennessee and that he had not visited the Nashville area where the defendant Davis practices except for a social visit to Nashville for 10 to 15 years ago. Dr. Gornet is unfamiliar with Tennessee laws and regulations relative to surgery in Tennessee and did not know any specific facts about hospitals or practice in the Nashville medical community. Dr. Gornet, however, had treated 5 to 10 patients from Tennessee and performed surgery on four of them. Dr. Gornet has talked to doctors in Tennessee and serves as a consultant with Dr. McNamara, a surgeon from Tennessee.

Since his expert report and for the first time at the Rule 104 hearing, Dr. Gornet disclosed that he had received some additional research on back surgeries in the Nashville

community. Dr. Gornet received this undisclosed information from manufactures of equipment used in spinal and back surgery. This information was generally documents on hospitals and back surgeries in Tennessee. Dr. Gornet requested this information approximately two weeks or less prior to the Rule 104 hearing. Dr. Gornet stated he was not prompted by anyone to perform this additional research. This information involves the years 1997, 1998, 1999 and 2000.

Dr. Gornet's opinion is, in essence, that based upon his knowledge of the plaintiff Kent A. Sommer, the results of prior diagnostic test and the standards of car, that the defendant Davis deviated from the standard of car when he used a stabilizing instrumentation across an unfused level at l3-4 of Kent Sommer's spine.

In a diversity action, Tennessee state law governs Plaintiffs' medical malpractice claims. Tennessee law, Tenn.

Code Ann. § 29-26-115(a)(1)[2] places the burden of proof on the Plaintiffs to establish that the defendant Davis failed to meet the standard of care in this medical community or a similar medical community. Tennessee courts hold that proof of a Tennessee physician's failure to adhere to the national standard of medical care is insufficient, as a matter of law, to satisfy this burden. Mabon v. Jackson County General Hosp., 968 S.W.2d 826, 830 (Tenn.Ct.App. 1988). Tennessee law also requires expert medical opinion to be based upon knowledge of the physicians who practice in the relevant community as well as knowledge about hospitals, physician training and the standard of medical care in that community. Id. at 930-31. In Spangler v. East Tennessee Baptist Hospital, No. E1999-01501-COA-R3-CV, Tenn.Ct.App. 2000, the Court noted that "[a]n expert testimony

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2 The Court notes that this statute in Ralph by Ralph v. Nagy, 749 F.Supp 169, 175-176 (M.D.Tenn. 1990) aff'd. 950 F.2d 326 (6th Cir. 1991).

that the standard of care does not vary nationwide does not set forth "specific facts" to prove the standard of care for particular community." Id. at p. 2 (quoting Mabon).

In the Court's view, the Plaintiffs did not present specific facts on the standard of care in the St. Louis community that Dr. Gornet utilizes as a similar community to the Nashville medical Community. Mabon refers to knowledge of doctors in the relevant medical community that the Court construes to mean that a testimony of a physician as to his singular experience is legally insufficient to define what the relevant medical community's practice is. The absence of specific facts about the St. Louis community does not enable the Court to perform the comparative analysis necessary under Tennessee law to determine if the medical community in St. Louis is similar to the Nashville medical community on spinal surgery methods.

Here, Dr. Gornet's testimony is also factually and legally

insufficient to establish his requisite knowledge of the standard of care in the Nashville community. In his deposition testimony, Dr. Gornet defined similarity between Nashville and St. Louis only in terms of the training of physicians. Mabon clearly requires knowledge of physicians who practice in the speciality at issue in the relevant area. Although Dr. Gornet knows a Dr. McNamara in this community, under Mabon, proof of knowledge of a single physician's practice in a local community does not satisfy the requirements of medical expert proof. The practice of a single physician in a local community does not establish the community standards of care.

As stated earlier, Dr. Gornet did not possess any knowledge of the nashville medical market at the time of his expert report or his deposition. Even with the more recent information disclosed at the Rule 104 hearing that Dr. Gornet acquired about the Nashville medical market on spinal surgeries;

that information was presented in a conclusory manner. With that conclusory information, the Court remains unable to perform the comparative analysis to determine if those facts establish the similarity of these communities on the proper standard of care. The fact of Dr. Gornet's opinion does not meet the requirements of Tennessee law that requires a showing of "specific facts" of the standard of care in the relevant Tennessee community as well as any of the noted similar communities.

The Court concludes that Plaintiff's proffered testimony on their medical malpractice claim does not conform to the requirements of Tennessee law. Without competent expert proof, Tennessee law requires that this action be dismissed for Plaintiffs' inability to establish breach of duty and causation.

An Appropriate Order is filed herewith.

This the 23rd day of May, 2001.

s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

A 12

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2003 FED App. 0034P (6th Cir.)

File Name: 03a0034p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENT A. SOMMER and
ANDREA SOMMER,
Plaintiffs-Appellants,

No.01-5761

v.

G. WILLIAM DAVIS and
CHARLES G. NORTON,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 98-01115--William J. Haynes, Jr., District Judge.

Argued: December 10, 2002

Decided and Filed: January 30, 2003

Before: NORRIS and GILMAN, Circuit Judges;
McKEAGUE, District Judge.*

COUNSEL

ARGUED: Walter C. Grace, WOMICK LAW FIRM, Marion, Illinois, for Appellants. William S. Walton, MILLER & MARTIN, Nashville, Tennessee, C. Bennett Harrison, Jr., CORNELIUS & COLLINS, Nashville, Tennessee, for Appellees. **ON BRIEF:** John Paul Womick, WOMICK LAW FIRM, Carbondale, Illinois, for Appellants. William S. Walton, Robert L. Trentham, MILLER & MARTIN, Nashville, Tennessee, C. Bennett Harrison, Jr., Bryan K. Williams, CORNELIUS & COLLINS, Nashville, Tennessee, Darrell G. Townsend, HOWELL & FISHER, Nashville, Tennessee, for Appellees.

OPINION

RONALD LEE GILMAN, Circuit Judge. Kent A. Sommer and his wife, Andrea Sommer, brought suit against two doctors, G. William Davis and Charles G. Norton, alleging that they had negligently performed surgery on Mr. Sommer. Because the

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*The Honorable David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation

district court concluded that the Sommers had failed to introduce any competent evidence that either defendant had breached the requisite standard of care, it granted summary judgment in favor of the defendants. The Sommers appeal, arguing that the district court erred in determining that their expert witnesses were not competent to testify under Tennessee law. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

In July of 1996, Kent Sommer traveled from his home in Carbondale, Illinois to Nashville, Tennessee to see G. William Davis, M.D., an orthopedic surgeon. Sommer was suffering from back pain, which was eventually attributed to degenerative changes in a disk in the lower part of his spine. After conservative treatment failed to alleviate the pain, Davis performed surgery on Sommer's back on July 15, 1997 in a Nashville hospital. The procedure involved the excision of the problematic disk and the implantation of artificial devices to stabilize Sommer's spine and thereby allow it to fuse.

On January 14, 1998, Sommer returned to the same Nashville hospital so that the stabilizing devices could be removed. This time the procedure was performed by Charles G. Norton, M.D., an associate of Davis's. He removed the artificial devices and

verified that Sommer's spine had fused.

Sommer's condition deteriorated shortly after leaving the care of his Nashville physicians. He subsequently sought treatment from Matthew F. Gornet, M.D., at a clinic in St. Louis, Missouri in August of 1998. His treatment in Missouri convinced Sommer that his Nashville doctors had negligently caused him injury.

B. Procedural background

Sommer and his wife brought suit against Davis on December 3, 1998 in the United States District Court for the Middle District of Tennessee. Nearly eight months later, the Sommers amended their complaint to add Norton as a defendant. The magistrate judge entered a stipulated case management order on March 2, 2000. Among the dates included in the order was a June 1, 2000 deadline for the Sommers to provide disclosures of any expert witnesses in accordance with Rule 26 of the Federal Rules of Civil Procedure. (This was already the second scheduling order in the case to include a cut-off date for expert witnesses. The initial expert-disclosure deadline was August 20, 1999.) Toward the end of May 2000, the Sommers filed an unopposed motion to extend the existing deadlines by 45 days. July 15, 2000 was then set as the new expert-disclosure date.

Norton moved for summary judgment on October 16, 2000. After the Sommers sought additional time to respond to the motion, the district court extended the time to November 22,

2000. The Sommers filed their opposition on November 27, 2000, and then filed additional papers in opposition the following day. An affidavit by Dr. Gornet and an unsworn letter dated November 21, 2000 from Gregory J. Loomis, M.D., a physician practicing in Evansville, Indiana, were attached to the Sommers' papers in opposition to the motion.

On February 7, 2001, the defendants jointly moved to exclude Dr. Gornet from testifying at trial unless he made himself available for a deposition. They also expressed concern over the possibility that the Sommers might seek to offer Dr. Loomis as a testifying expert, even though he had not been disclosed as one. On February 21, 2001, the Sommers filed a response in opposition to the defendants' motion. The primary ground of their opposition was that "Dr. Gornet, first, is not a retained expert. Dr. Gornet is a treating doctor." They specifically denied that Dr. Gornet was an expert witness within the purview of Rule 26.

Five days later the Sommers moved for leave to file "a supplemental Rule 26 opinion witness disclosure containing the identification of Dr. Gregory Loomis." The defendants argued that the district court should deny this motion because the Sommers had not identified any reason for their failure to identify Dr. Loomis by July 15, 2000, and because trial was scheduled for May 22, 2001. Davis subsequently moved for an order in limine to exclude Dr. Loomis as an expert witness on

the ground that Dr. Loomis was not competent under Tennessee law to testify on any issue in the case. He also filed a similar motion that sought to exclude Dr. Gornet as an expert witness, but this motion alternatively requested a hearing to determine the admissibility of Dr. Gornet's testimony pursuant to Rule 104 of the Federal Rules of Evidence.

On April 25, 2001, the district court denied the Sommers' motion to disclose Dr. Loomis as an expert witness, warned the Sommers that Dr. Gornet would not be permitted to testify at trial unless he made himself reasonably available for a deposition, and granted Norton's motion for summary judgment. The Sommers moved for reconsideration.

After conducting the requested Rule 104 hearing, the district court ruled that Dr. Gornet was not competent under Tennessee law to testify about the standard of medical care in Nashville or in a community similar to Nashville. It therefore granted Davis's motion to exclude Dr. Gornet from testifying. Because this rendered the Sommers unable to carry their burden of proof, the district court on its own initiative dismissed the action with prejudice. Finally, the district court denied the Sommers' motion to reconsider the award of summary judgment to Norton. This timely appeal followed.

II. ANALYSIS

A. The district court did not err in granting summary

judgment to Norton

We review the district court's grant of summary judgment de novo. *Sperle v. Michigan Dep't of Corr.*, 297 F.3d 483, 490 (6th Cir. 2002). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering such a motion, the court construes all reasonable factual inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

In the case before us, the Sommers argue that summary judgment for Norton was improper because genuine issues of material fact remained in dispute regarding their claim against him. The Sommers alleged that "on or about January 14, 1998, Dr. Norton undertook to perform an orthopaedic surgical procedure on the Plaintiff in which certain hardware referred to as the vari-grip system was removed [and] [t]hat Dr. Charles G. Norton negligently performed said procedure to include but not limited to adequately exploring Mr. Sommer's fusion." To prevail on this medical malpractice claim against Norton, they had to prove the following:

> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Tenn. Code Ann. §§ 29-26-115(a).

None of the evidence produced by the Sommers in their response to Norton's motion for summary judgment even mentioned Norton, let alone identified facts from which a jury could conclude that he had been negligent. As noted in Part I.B. above, the Sommers filed an affidavit by Dr. Gornet and an unsworn letter dated November 21, 2000 from Dr. Loomis. Dr. Gornet's affidavit mentions several alleged deficiencies in Davis's work, but it does not refer to Norton at all. Dr. Loomis similarly opined in his letter on Davis's alleged shortcomings, but he too failed to mention Norton.

Parties opposing a properly supported motion for summary

judgment "may not rest upon the mere allegations" of their pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Because the Sommers failed to set forth any facts, material or otherwise, relevant to their claim against Norton, the district court properly granted his motion for summary judgment.

B. The district court did not err in denying the Sommers' motion to reconsider

In their notice of appeal, the Sommers stated that they were appealing the denial of their motion to reconsider the award of summary judgment to Norton. They have not, however, presented any argument on this subject in their briefs. We therefore consider this issue as abandoned. *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir. 1989) ("We normally decline to consider issues not raised in the appellant's opening brief.").

On the merits, moreover, the district court did not err. We typically review the denial of a motion to reconsider using the "abuse of discretion" standard, "but where reconsideration of summary judgment was sought, . . . a de novo review" is appropriate. *United States v. $515,060.42*, 152 F.3d 491, 497 (6th Cir. 1998). The Sommers did not present the district court with any reason to reconsider the grant of summary judgment. They did, however, attempt to offer as new evidence certain excerpts from Dr. Gornet's deposition, in which he opines that

Norton's performance was negligent. But Dr. Gornet was the Sommers' witness, and they utterly failed to explain why his opinion on Norton's conduct was unavailable to them when they had earlier responded to Norton's motion for summary judgment.

A district court's refusal to consider evidence produced for the first time on a motion to reconsider will be reversed only if the refusal constitutes an abuse of discretion. *Hayes v. Norfolk S. Corp.*, No. 00-3876, 2001 WL 1631430, at *6 (6th Cir. Dec. 18, 2001) (unpublished table decision) (citing *Huff v. Metro. Life Ins. Co.*, 675 F.2d 119, 123 (6th Cir. 1982)). Given that the Sommers provided no reason why Dr. Gornet's opinion on Norton could not have been produced earlier, the district court did not abuse its discretion in refusing to consider the new evidence. Finally, for the reasons explained in Part II.D. below, Dr. Gornet was not competent to offer opinion evidence in this case regarding the applicable standard of care. Summary judgment for Norton would therefore have been appropriate even if the Sommers had timely submitted Dr. Gornet's later opinions in their initial opposition to Norton's motion.

C. The district court did not err in excluding Dr. Loomis's expert testimony

The Sommers next claim that the district court erred in denying their motion to file a supplemental Rule 26 disclosure as to Dr.

Loomis and in granting Davis's motion in limine to exclude Dr. Loomis's testimony. Both rulings were based on the Sommers' untimeliness in disclosing Dr. Loomis as an expert witness. Although the Sommers contend that "[b]y applying Tennessee law instead of the Federal Rules of Evidence the court improperly barred Dr. Loomis from testifying," this was not the basis of the district court's ruling. Instead, the district court relied on Rule 37 of the Federal Rules of Civil Procedure. Rule 37 provides in pertinent part as follows: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c). We will reverse a district court's invocation of Rule 37 sanctions only if we find an abuse of discretion. *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994).

After multiple extensions, the final expert-disclosure deadline was set for July 15, 2000. Yet the Sommers waited until February 26, 2001 to disclose Dr. Loomis as an expert witness. Their motion in the district court articulated no justification (much less a substantial one) for their untimeliness, nor have they put forward any justification on appeal. The Sommers assert generally that the defendants would not have been prejudiced by allowing Dr. Loomis to testify. Harmlessness, however, is the key under Rule 37, not prejudice. The advisory

committee's note to Rule 37(c) "strongly suggests that 'harmless' involves an honest mistake on the part of a party coupled with sufficient knowledge on the part of the other party." *Vance v. United States*, No. 98-5488, 1999 WL 455435, at *5 (6th Cir. June 25, 1999) (unpublished table decision).

Nothing in the present case suggests that the failure to disclose Dr. Loomis in a timely manner was the result of an honest mistake. Nor did the defendants have sufficient knowledge of him or his opinions, since the first hint that he might have some involvement in the case came in the form of his unsworn letter that was filed months after the expert-disclosure deadline. We therefore conclude that the district court did not abuse its discretion in denying the Sommers' motion to file a supplemental Rule 26 disclosure.

Furthermore, the Sommers specifically waived any opposition to Davis's motion in limine to bar Dr. Loomis from testifying. The district court made the following comment on the status of the motions in limine at the May 7, 2001pretrial conference: "Well, if there is no opposition filed, then I am inclined to grant the motions." Counsel for the Sommers responded: "Your Honor, the only one we really object to is the motion pertaining to Dr. Gornet's testimony." Under these circumstances, the Sommers, who disavowed opposition to the motion to exclude Loomis's testimony in the district court, cannot now assert error regarding the grant of the motion. *Maska U.S., Inc. v. Kansa*

Gen. Ins. Co., 198 F.3d 74, 79 (2d Cir. 1999) (holding that a party could not press a particular contention on appeal after "specifically inform[ing]" the district court that it was not so contending); *see Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 544 (6th Cir. 1996) (holding that, absent exceptional circumstances, "failure to raise [a particular] issue in the district court precludes argument in that regard on appeal").

D. The district court did not err in excluding the testimony of Dr. Gornet

The Sommers' primary contention on appeal is that the district court erred in excluding Dr. Gornet's testimony. Dr. Gornet was barred from offering expert testimony because the district court concluded that, as a matter of law, he did not have knowledge of "the recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury . . . occurred." Tenn. Code Ann. §§ 29-26-115(a)(1). He was therefore unable to offer any evidence that was relevant to the Sommers' claims.

Much of the Sommers' argument about the exclusion of Dr. Gornet focuses on Tennessee Code §§ 29-26-115(b), which requires experts who testify in medical malpractice cases to be licensed in Tennessee or in a contiguous state. They argue both

that the statute is unconstitutional and that its application is precluded by Rule 702 of the Federal Rules of Evidence. To the extent that these arguments have any applicability to this case, the Sixth Circuit has definitively rejected them. *Legg v. Chopra*, 256 F.3d 286, 291, 292 (6th Cir. 2002) ("In sum, Federal Rule of Evidence 601 dictates that the [sic] Tennessee's witness competency rule governs the admissibility of medical expert testimony. . . . [W]e hold that the district court did not err in applying Fed. R. Evid. 601 and Tenn. Code Ann. §§ 29-26-115(b) in its analysis.").

The applicability of these arguments, moreover, is dubious at best. Dr. Gornet practices in Missouri, which borders Tennessee. Section 29-26-115(b) therefore poses no barrier to his testimony, and the district court did not rely on that section. Rather, the district court determined that Dr. Gornet had no personal knowledge of the standard of care in Nashville or in a similar community. Breach of that particular standard of care must be proved in order for a plaintiff to prevail in a Tennessee medical malpractice claim. Tenn. Code Ann. §§ 29-26-115(a).

"[A]buse of discretion is the proper standard of review of a district court's evidentiary rulings." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (discussing the qualifications of experts); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 738 (6th Cir. 2000) ("A district court's determinations of relevancy are subject to review for abuse of

discretion.").

The Tennessee Court of Appeals in *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d 826, 830 (Tenn. Ct. App. 1997), decided that the plaintiff's proposed expert did not have knowledge of the standard of care in the defendant's community or a similar one where he

> state[d] in his affidavit that he was familiar with the recognized standard of acceptable medical practice in an area such as Jackson, Tennessee and at a facility the size of Hospital. He further state[d] that the standard of care in Jackson and at Hospital would be comparable to the cities and facilities at which he has practiced medicine and is the same for New York [C]ity and other large cities and, in effect, is a national standard.

Finding "that his statement in his affidavit regarding the standard of care is premised on the national standard of care and not on the standard of care for [the defendant's community] or similar communities," the court rejected his testimony. *Id.; see also Robinson v. LeCorps*, 83 S.W.3d 718, 724 (Tenn. 2002) ("Our interpretation of the statute is consistent with prior Court of Appeals' decisions, including *Mabon v. Jackson-Madison County Gen. Hosp.*").

On the other hand, while conceding that the proposed expert's "testimony concerning the similarity of Lexington and Memphis

is somewhat meager," the Tennessee Court of Appeals in *Wilson v. Patterson*, 73 S.W.3d 95, 105 (Tenn. Ct. App. 2001), found the testimony "barely sufficient to withstand attack at the summary judgment stage of the proceeding." The proposed expert in *Wilson* stated by affidavit that "[b]oth Lexington, Kentucky and Memphis, Tennessee are regional medical centers and are the locations of their state medical schools," and that he had "had the opportunity to review the depositions of and hear the testimony of numerous Memphis, Tennessee physicians on the recognized standard of care." *Id.* at 99, 100.

At the Rule 104 hearing, Dr. Gornet explained the basis for his opinion that St. Louis (where he practices and with whose standard of care he is familiar) was a similar community to Nashville as follows:

> I feel the communities are similar as far as demographics. I feel that their training, the medical schools here are very, very similar. Washington University and Vanderbilt are both acknowledged as outstanding. In fact, if you look, they are in the same consortium of medical schools. There's about 12 medical schools that are sort of an elite group. Vanderbilt and Washington University are like that.
>
> As far as the community down here, as we have talked about, reviewing information I have, there are similar

> hospitals, similar procedures are performed. We have meetings with [sic] where all of us attend the meetings, hear the same lectures. And so I feel confident saying that.

Dr. Gornet also testified that he personally knew one physician from Nashville and that he had seen a couple of patients from that city.

On the other hand, Dr. Gornet affirmed that "[t]he standards [for spinal fusion surgery] do not vary regardless of where and under what circumstances in the United States of America that surgery is performed." At another point during the same hearing, moreover, counsel for Davis asked him: "You don't know any of the characteristics of the Nashville medical community at that time, do you, sir?" Dr. Gornet replied: "In 1997; that's correct."

Comparison of Washington University and Vanderbilt is similar to the statement that "Lexington, Kentucky and Memphis, Tennessee are regional medical centers and are the locations of their state medical schools," which was part of the evidence that the *Wilson* court found barely sufficient under Tennessee Code §§ 29-26-115(a). Dr. Gornet also had additional bases for evaluating the similarity of Nashville and St. Louis; that is, he knew one doctor from Nashville and had seen a couple of Nashville patients. This is analogous to, though less extensive than, the knowledge of the proposed expert in *Wilson*, who had

reviewed the testimony of numerous local physicians.

Stating that the standard of care has no variance nationally, however, resembles the type of assertion that was rejected in *Mabon*. "While an expert's discussion of the applicability of a national standard of care does not require exclusion of the testimony, such evidence may not substitute for evidence that first establishes the requirements of Tenn. Code Ann. §§ 29-26-115(a)(1)." *Robinson*, 83 S.W.3d at 724. Dr. Gornet also admitted that he did not "know any of the characteristics of the Nashville medical community" at the time of Sommer's surgery. The proposed expert in *Wilson* made no similar statement.

It may well be that the standard of care for surgery involving spinal fusion is in fact uniform nationwide. But neither this possibility, which has not been established in this record, nor our policy views of medical malpractice litigation control this case. Absent a federal question, "the law to be applied in any case is the law of the state. And whether the law of the state be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Tennessee Supreme Court recently rebuffed a plaintiff who urged the court to adopt "a national standard of care for all malpractice actions, malpractice actions involving physicians who are board-certified in a particular area, or malpractice actions involving a specific treatment issue or area of medicine." *Robinson*, 83 S.W.3d at

723. In rejecting this request, the court specifically "decline[d] to adopt the plaintiff's interpretation based on either policy arguments or alleged evidence of the existence of a national standard of care in the medical community." *Id.* at 723-24. For us to do otherwise would lead to the kind of forum shopping that was halted by the decision in *Erie*.

Confining ourselves to the application of Tennessee law as articulated by its courts, we note that certain aspects of Dr. Gornet's testimony concerning the similarity of Nashville and St. Louis resemble the evidence found to be lacking in *Mabon*, whereas other aspects are analogous to the evidence that barely passed muster in *Wilson*. We will find an abuse of discretion only when we have a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 740 (6th Cir. 1999). Particularly given Dr. Gornet's acknowledgment that he did not "know any of the characteristics of the Nashville medical community" at the time of Sommer's surgery, we conclude that the district court did not abuse its discretion in refusing to allow Dr. Gornet to express his opinions regarding the applicable standard of care.

E. The district court did not err in granting judgment to Davis

The Sommers could not possibly prove their claims against Davis once they were deprived of the opinion testimony of both Dr. Loomis and Dr. Gornet. They have not contended otherwise before either the district court or this court. After the district court decided to preclude Dr. Gornet from giving expert testimony, Davis was therefore entitled to judgment as a matter of law.

But Davis did not have a motion for summary judgment pending before the district court. Instead, the court dismissed the action with prejudice on its own initiative. The Sommers argue that this procedure was improper. They assert that Davis should have been required to wait until the close of their case at trial to move for judgment as a matter of law.

"[T]he procedural decision to enter summary judgment *sua sponte* must . . . be reviewed to determine if the court abused its discretion by entering the judgment on its own motion." *Employers Ins. of Wasau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 105 (6th Cir. 1995). Factors to consider in making this determination include whether the parties who would oppose such a judgment had notice that judgment could be granted against them and whether they had a facially meritorious defense to the judgment. *Id.* at 105-06.

At the May 7, 2001 pretrial conference--two weeks before the Rule 104 hearing--the district court asked counsel for the

Sommers: "Well, okay. It seems to me that if Dr. Gornet can't express an opinion as an expert witness, how are you going to prevail in this case?" Counsel for the Sommers replied: "I can't possibly prevail, Your Honor." Later during the same conference, the district court commented: "Seems to me like if that motion--if he is not--the certification, if he can't meet the requirement for an expert witness in this area, then it seems to me like the case is out. And there is no point of bringing a jury in the next day. Does either side dispute that?" Counsel for the Sommers responded: "No, sir; I don't." The Sommers thus had ample notice that the district court would enter judgment against them if Dr. Gornet was excluded from testifying as an expert witness. Finally, given the exclusion of Dr. Gornet's expert testimony, they had no facially meritorious defense to summary judgment. We therefore hold that the district court did not abuse its discretion in entering judgment in favor of Davis on its own motion.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.